No. 84-403

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

DENNIS ALTMAN,

Petitioner,

v.

PETER F. HURST, Chief of Police of the City of Hickory Hills, Illinois, ERVIN KOZICKI, Mayor of Hickory Hills, Illinois, and THE CITY COUNCIL OF THE CITY OF HICKORY HILLS, ILLINOIS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Should the due process clause of the Fourteenth Amendment of the United States Constitution relative to property or liberty rights be inoperative if the violations of those rights might open the floodgates to federal litigation?

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DENNIS ALTMAN,

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PETER F. HURST, Chief of Police of the City of Hickory Hills, Illinois, ERVIN KOZICKI, Mayor of Hickory Hills, Illinois, and THE CITY COUNCIL OF THE CITY OF HICKORY HILLS, ILLINOIS,

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OPINIONS BELOW

On March 4, 1983, the Honorable George N. Leighton granted respondents' motion to dismiss petitioner's first amended complaint on the legal theory that neither property rights nor liberty right interests had been established

pursuant to 42 U.S.C. Section 1983 relative to the petitioner being required to sit outside the office window of the Chief of Police of the City of Hickory Hills, Illinois, assigning the petitioner to undesirable tasks, depriving the petitioner of overtime, and changing petitioner's vacation time, requiring petitioner to foot patrol contrary to medical advice, said acts by the respondents being done in conjunction with harassment or punishment of the petitioner as retaliation by the petitioner's superiors for the petitioner's encouraging a fellow police officer to appeal an order of suspension (Memorandum opinion of the Honorable George N. Leighton is reprinted herein as Appendix C).

In conjunction with a motion for reconsideration as filed by the petitioner concerning the order of dismissal of petitioner's first amended complaint on March 4, 1983, the Honorable George N. Leighton reconsidered and determined to reaffirm his opinion of March 4, 1983 by a memorandum opinion of April 18, 1983 (Memorandum opinion of the Honorable George N. Leighton is reprinted herein as Appendix D).

Subsequently the petitioner appealed to the United States Court of Appeals, Seventh Circuit, and, in an opinion written by the United States Court of Appeals, Seventh Circuit, on May 18, 1984, the United States Court of Appeals held that, although the petitioner may have established a property right in vacation time, nevertheless the balancing of interest concept would negate the application of the violation of the due process clause of the Fourteenth Amendment of the United States Constitution to that particular cause of action of the petitioner's complaint.

In effect the Court determined that the loss would be de minimis, since the petitioner had not been denied vacation time, only that his vacation had been altered in terms of when he would be able to take it.

At the same time the Court also determined that the petitioner's first amended complaint pertaining to particular job assignments or overtime opportunities did not claim any mutually explicit understandings that established an entitlement to such benefits with the result that the petitioner's cause of action was not founded on a property right consideration.

As far as punishment of the petitioner by requiring him to undertake foot patrol contrary to medical advice to that effect, since the petitioner's physical condition would not permit foot patrol duties, and requiring the petitioner to sit in front of his police chief's window, the Court determined that, since the petitioner was neither suspended nor discharged, there was no cause of action on the basis of a property right to a hearing pursuant to 24 Illinois Revised Statutes, Section 10-2.1-17, which provides for a property right hearing only for suspensions or discharges.

In addition the Court also ruled that the allegations of property rights relative to vacation time, overtime opportunities, particular job assignments, sitting in front of the police chief's window, requiring foot patrol duties contrary to medical advice, did not constitute any liberty interest violations.

However the United States Court of Appeals was not comfortable with its decision when it stated:

> . . . Despite our sympathy for plaintiff and our incredulity over some of the disciplinary measures imposed by defendants, we recognize that permitting

him to maintain this action would open the federal floodgates to all manner of petty personnel disputes.

The United States Court of Appeals, Seventh Circuit, decision is reprinted herein as Appendix A.

From that decision, the petitioner filed a petition for rehearing and a suggestion for rehearing en banc which petition was denied pursuant to an order to that effect of June 11, 1984 (The order is reprinted herein as Appendix B).

JURISDICTION

1. The federal question was raised by the petitioner's complaint and first amended complaint to the effect that the petitioner either had property or liberty interest rights to vacation time, particular job assignments, overtime pay, hearing requirements relative to punishment that required him to sit in front of his police chief's window and to foot patrol contrary to medical advice pursuant to the due process clause under the Fourteenth Amendment of the United States Constitution and that those rights were violated pursuant to 42 U.S.C. 1983, 28 U.S.C. paragraphs 2201, 2202, 1331 and 1343.

2. The petition for Writ of Certiorari was filed within ninety days after the entry of the order by the United States Court of Appeals for the Seventh Circuit, Chicago, Illinois, on June 11, 1984, denying petitioner's petition for rehearing and a suggestion for rehearing en banc.

CONSTITUTIONAL PROVISION INVOLVED

Amendment XIV:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

That, on September 10, 1982, the petitioner was a sergeant on the City of Hickory Hills, Illinois, police department.

That, on September 10, 1982, Police Chief Peter F. Hurst requested of the petitioner to prepare performance evaluations of two City of Hickory Hills, Illinois, police officers covering a twelve month period prior to September 10, 1982, of police officers Alexander and Braje.

In conjunction with those two aforementioned police officers, petitioner furnished a written memorandum relating to the performance of those officers to the Chief of Police Peter F. Hurst of the City of Hickory Hills, Illinois.

At the same time, on September 17, 1982, the petitioner was ordered to submit a written memorandum to Peter F. Hurst, the Chief of Police of the City of Hickory Hills, Illinois, regarding the petitioner's failure to notify the

Chief of Police about a disturbance involving Officers Alexander and Braje.

Likewise the petitioner was to furnish a written memorandum to the Chief of Police of the City of Hickory Hills, Illinois, Peter F. Hurst, detailing the reasons for the petitioner assisting Officer Braje in the filing of an appeal of her suspension to the Board of Fire and Police Commission of the City of Hickory Hills, Illinois.

That, although the petitioner complied with the request and orders relating to officers Alexander and Braje, in which he denied assisting Officer Braje in appealing her suspension to the Board of Fire and Police Commission of the City of Hickory Hills, Illinois, on September 22, 1982, he was ordered to report to duty from 8 a.m. to 4 p.m. Monday through Friday, which duty required him to sit in a chair outside the Police Chief's office window of the police station.

That, in an interview with the Chicago Tribune, Mayor Ervin Kozicki of the City of Hickory Hills, Illinois, confirmed that the petitioner was being punished by the police order which required him to sit in a chair outside the Police Chief's window of the police station.

That, as additional punishment on September 29, 1982, the petitioner was assigned to the position of desk sergeant with a curtailment of his responsibilities wherein he was ordered not to answer any police calls, not allowed to be involved in any police work.

As continued punishment on November 1, 1982, although the petitioner was assigned in the capacity of desk sergeant, nevertheless his duties were reassigned by the watch commander to other police officers of the City of Hickory Hills, Illinois.

That as additional punishment from September 22, 1982 and specifically from November 11, 1982 to November 15, 1982, while all other sergeants of the City of Hickory Hills, Illinois, police department, had received 105.75 hours of overtime, the petitioner had not been accorded the same overtime benefit pursuant to the custom and practice of the City of Hickory Hills, Illinois police department.

That prior to September 22, 1982, the petitioner had been assigned supervisory duty and a routine squad car patrol pursuant to his job description.

On November 22, 1982, the respondents ordered the petitioner to foot patrol which not only violated his job description but violated Dr. Frank DeVincenzo's medical advice directed to the respondents that the petitioner's physical condition would not permit such foot patrol duties.

That the change of duties by the respondents was continued punishment.

Lastly the petitioner was granted vacation every April of every year pursuant to the custom and practice of the respondents to permit its police officers to select their vacation time; as punishment, the respondents altered the petitioner's vacation schedule.

REASONS FOR GRANTING THE WRIT

THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION RELATIVE TO PROPERTY OR LIBERTY RIGHTS MUST BE OPERATIVE REGARDLESS IF THE VIOLATIONS OF THOSE RIGHTS MIGHT OPEN THE FLOODGATES TO FEDERAL LITIGATION.

Although, as the United States Court of Appeals for the Seventh Circuit noted on page 8a of its opinion, "(d)espite our sympathy for plaintiff and our incredulity over some of the disciplinary measures imposed by defendants" the Court determined that "we recognize that permitting him to maintain this action would open the federal floodgates to all manner of petty personnel disputes."

Yet, as the Court points out, had the plaintiff succumbed to the defendants' campaign of harassment and quit his job, he would clearly have had a federal remedy. Op. at 7a. The plaintiff would have brought the action under a theory of constructive discharge. *See, Bourgue v. Powell Electrical Mfg. Co.*, 617 F.2d 61 (5th Cir. 1980). A finding of constructive discharge requires that, ". . . working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." *Alicea Rosado v. Garcia Santiago*, 562 F.2d 114, 119 (1st Cir. 1977).

Here, the plaintiff was forced to remain, regardless of the weather, at a fixed post in front of the police station under his supervisor's window. He was not even allowed to leave to use the bathroom without asking for permission. The situation was made even more absurd by extensive media coverage of the plaintiff "guarding" the front of the station. Clearly, a reasonable person subjected

to this treatment would have been justified in resigning his position. The fact that this particular plaintiff could not be broken by the ordeal is no reason to deny him his federal remedy. As the Court stated:

> It may seem illogical and unfair to take away plaintiff's federal remedy because he insisted on toughing-out his ordeal. The constructive discharge cases cannot be distinguished by pointing to the loss of income attendant to such a job loss. The measure of real loss in such a situation need not be significant—plaintiff need not show that he has been unable to obtain comparable alternate employment to maintain an action. Op. at 7a.

Based upon the observations of this Court, this decision concerns itself with grievances that are not petty.

Yet the United States Court of Appeals refused to grant the petitioner a cause of action in that it would open the federal floodgates to all manner of petty personnel disputes.

Query—Is the reasoning of the Court founded on sound judicial principles for denying the petitioner a cause of action, as this Court has admitted in its opinion, because it would open the federal floodgates to civil rights litigation?

Certainly, under *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), which decision is cited by the United States Supreme Court in *Davis v. Passman*, 442 U.S. 228 (1979), the judicial pronouncement of denying a federal cause of action because it might open the federal floodgates to litigation was rejected, when, at page 248, the Court states:

> "Judicial resources, I am well aware, are increasingly scarce these days. Nonetheless, when we automatic-

> ally close the courthouse door solely on this basis, we implicitly express a value judgment on the comparative importance of classes of legally protected interests. And current limitations upon the effective functioning of the courts arising from budgetary inadequacies should not be permitted to stand in the way of the recognition of otherwise sound constitutional principles."

Consequently the United States Court of Appeals in *Davis v. Passman* has determined that a plaintiff has a constitutional right to redress his injury in damages which is a remedial mechanism normally available in the Federal Courts.

In this instance, to deny the petitioner his federal remedy would, in effect, reward the respondents by relieving them of their liability merely because the petitioner had sufficient will to withstand the respondents' attempts to force him off the police force.

In this instance respondents' actions have clearly damaged the petitioner. As the Court states:

> . . . the utility one obtains from a job does not derive exclusively from the amount of pecuniary remuneration received. Plaintiff, prior to the giving of his advice and the filing of his law suit, could take pride and pleasure in the supervisory responsibilities of his job. He may well have suffered a real, albeit psychic, loss through reassignment to "window watch" and foot patrol, even though his salary remained constant. Moreover, his human capital—measured in terms of opportunities for advancement—may well be impaired by defendants' decision to deny him responsible work assignments. Op. at 7a.

Furthermore, in its opinion, the United States Court of Appeals, has categorized the disputes of the petitioner herein as those that should be left to internal procedures

established by employers or in the absence of such procedures then the state courts should be utilized to redress petitioner's constitutional due process violations.

Unfortunately, as the petitioner's case demonstrates, in the absence of adequate internal procedures, such as a grievance procedure, there is no opportunity for the petitioner to secure a due process hearing to protect himself against disciplinary measures that are beyond belief; in addition, state court adjudication is not the answer for the reasons set forth hereinafter.

To suggest that the petitioner should resort to state court action pursuant to *Parratt v. Taylor*, 451 U.S. 527 (1981), is a reliance that is misplaced. Upon closer examination, it becomes clear that the petitioner has no such remedy available.

No action for defamation will likely be available to the petitioner. A police officer is considered a public official for purposes of a First Amendment analysis in a libel and slander case. *See, Fogus v. Capital Cities Media, Inc.*, 111 Ill.App.3d 1060 (1982). It is doubtful that the petitioner will be able to prove the level of malice required to recover under this theory. *New York Times v. Sullivan*, 376 U.S. 254 (1964).

The respondents' conduct obviously caused the petitioner to suffer humiliation and emotional anguish. Even so, the petitioner finds himself without a state court remedy.

Illinois courts will not recognize a cause of action for negligent infliction of emotional distress in the absence of a contemporaneous physical injury to the petitioner. *Brown v. Craven*, 175 Ill. 401 (1898), *Cutright v. City National Bank of Kankakee*, 88 Ill.App.3d 742 (1980).

If there is no physical impact, the right to recover exists only where the infliction of mental distress was in-

tentional. *Kaiserman v. Bright*, 61 Ill.App.3d 67 (1978). Assuming the respondents intended that their actions cause the petitioner to suffer mental distress, the requirements of a cause of action may not be present under the standards established by the Illinois Supreme Court in *Public Finance v. Davis*, 66 Ill.2d 85 (1976).

The conduct must be extreme and outrageous, liability does not extend to "mere insults, indignities, threats, annoyances, petty oppressions or trivialities." *Public Finance v. Davis*, 66 Ill.2d 85 (1976)

An example of what constitutes extreme and outrageous conduct sufficient to support a claim of intentional infliction of mental distress is *Morrison v. Sandell*, 112 Ill. App.3d 1057 (1938). This case arose when one of the plaintiff's co-workers undertook a campaign of on the job harassment of the plaintiff. The defendant's conduct included mixing up the plaintiff's working papers and file cards, deliberately giving the plaintiff insufficient training and subsequently assigning difficult work which the plaintiff could not do. The defendant also encouraged other workers to make hostile stares and comments whenever the plaintiff was around, and on one occasion even placed human waste in a file drawer that the plaintiff was about to use. The Court held that the conduct was not of such an extreme and outrageous nature to allow recovery under a theory of intentional infliction of emotional distress.

Furthermore, the mental distress suffered by the petitioner must itself be severe. Types of emotional distress such as shame, humiliation and worry are not necessarily actionable. The distress inflicted must be so severe that no reasonable man could be expected to endure it. *Public Finance v. Davis*, 66 Ill.2d 85 (1976).

In light of the foregoing, it becomes apparent that the petitioner's ability to bring a tort action in state court is not as readily available as the Court suggests. Because of this lack of state remedies it becomes imperative that a federal action be allowed in this case.

Although there is no actual or constructive discharge, there is no reason to hold that the grievances, herein, are not constitutionally protected when the Court has expressed sympathy for the petitioner, has recognized the respondents' intent to induce the petitioner to resign and has admired the petitioner for toughing-out his ordeal.

The integrity of the Fourteenth Amendment demands that the petitioner have a remedy for the deprivation willfully inflicted by the respondents in this case, which remedy is attainable via *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, supra,* and *Davis v. Passman, supra.*[1]

CONCLUSION

The writ should issue to the United States Court of Appeals for the Seventh Circuit, in that the United States Court of Appeals should have reversed the Honorable George N. Leighton and should have denied the respondents' motion to dismiss the petitioner's first amended

[1] The Grand Lodge of the Fraternal Order of Police, consisting of approximately 150,000 members, has advised counsel for the petitioner that it supports the petitioner's legal position as expressed in this petition for writ of certiorari.

complaint, since that complaint was based upon property or liberty right considerations that should not have been denied on the legal theory that the recognition of such a cause of action might open the floodgates to federal civil rights litigation.

Respectfully submitted,

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 83-1868

DENNIS ALTMAN,

Plaintiff-Appellant,

v.

PETER F. HURST, Chief of Police of the City of Hickory Hills, ERVIN KOZICKI, Mayor of Hickory Hills, Illinois, and THE CITY COUNCIL OF THE CITY OF HICKORY HILLS, ILLINOIS,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 82 C 7224—**George N. Leighton**, *Judge.*

ARGUED APRIL 24, 1984—DECIDED MAY 18, 1984

Before BAUER, WOOD, and POSNER, *Circuit Judges.*

PER CURIAM. Plaintiff Dennis Altman appeals the grant of defendants' Rule 12(b)(6) motion dismissing his civil rights action brought pursuant to 42 U.S.C. § 1983 against the chief of police, mayor, and city council of the city of Hickory Hills, Illinois. We affirm.

Plaintiff is a police sergeant employed by the city of Hickory Hills, Illinois. Defendant Hurst, the police chief, became upset with plaintiff, whom he suspected had en-

couraged another officer to appeal her suspension.[1] Plaintiff denies ever giving such succour or advice. Apparently unconvinced, Hurst reassigned plaintiff to a fixed post outside his office window in front of the police station. Plaintiff could not leave his post, even to go to the bathroom, without first requesting permission; nor was he reassigned indoor duty during inclement weather. At all times he was in full public view. After plaintiff filed his original complaint in the case at bar, defendants stepped up their campaign of harassment, reassigning him to foot patrol duty, denying him overtime opportunities, and rescheduling his vacation time. Plaintiff seeks declaratory relief and damages for violations of his constitutional rights.

Plaintiff claims that defendants' punishment violated the due process clause of the fourteenth amendment. That amendment forbids any state from depriving "any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The starting point for analysis, then, is whether defendants deprived plaintiff of any cognizable "property" or "liberty" interest.[2]

A property interest arises for purposes of the due process clause, "if there are such rules or mutually explicit understandings that support [a] claim of entitlement to the benefit . . . ." *Perry v. Sindermann*, 408 U.S. 593, 601 (1972). Plaintiff cites 24 Ill. Rev. Stat. ¶ 10-2.1-17 for the proposition that state law mandates a hearing prior to the imposition of disciplinary punishment. That provision, however, applies only to the removal, discharge, or suspension of a police officer. It does not require a pre-

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[1] Hurst also was upset by plaintiff's failure to timely report an incident involving the officer who was suspended.

[2] In reviewing the dismissal, we bear in mind that the district court could not grant defendants' motion unless it appeared beyond doubt that plaintiff could prove no set of facts which would entitle him to relief. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

deprivation hearing prior to the imposition of departmental disciplinary sanctions or even a demotion.[3]

Plaintiff also asserts a longstanding, mutually explicit understanding between himself and the department that he would annually receive vacation time in April.[4] Even assuming that a cognizable property interest arises from such a de minimis loss,[5] it does not follow that plaintiff is due a predeprivation hearing. A balancing of interests must take place to determine whether a deprivation occurred without due process of law. The following factors must be balanced:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

Consideration of these factors leads to the conclusion that plaintiff was not deprived of any process due him. Plaintiff's asserted interest in an April vacation is trivial

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[3] At most, plaintiff has been constructively demoted without a reduction in pay. This court has previously expressed doubts that such an action can be a deprivation of property. *Lyznicki v. Board of Education*, 707 F.2d 949, 951 (7th Cir. 1983). In any event, the state legislature had demonstrated in other contexts that it knows how to draft laws that require pre-demotion hearings. *See* 121 Ill. Rev. Stat. ¶ 307.14 (state troopers); 125 Ill. Rev. Stat. ¶ 164 (county sheriffs).

[4] Plaintiff does not claim any mutually explicit understandings that establish entitlement to particular job assignments or overtime opportunities.

[5] Plaintiff does not complain that he was denied vacation time—only that he was not permitted to take his vacation in April.

and insubstantial. While the rescheduling may have inconvenienced him and defeated an expectation interest, such is not the stuff of constitutional torts. *Cf. Brown v. Brienen*, 722 F.2d 360 (7th Cir. 1983). On the other hand, the police department has a substantial interest in managing the day-to-day work schedules of its employees. Even assuming that the switch in vacation times was wrongful punishment, it would unduly burden the police to require them to give notice and an opportunity to respond to everyone whose schedules are rearranged for disciplinary reasons.

Our facts resemble those in *Parratt v. Taylor*, 451 U.S. 527 (1981). The Court there found that the loss of an inmate's hobby kit by prison officials deprived him of a property interest. Nevertheless, the Court held that no cause of action was made out under section 1983 since the deprivation was not "without due process of law." Plaintiff could receive all the process he was due in a post-deprivation hearing; namely, a state tort action for wrongful deprivation of his property.[6] Thus, even assuming that plaintiff is due *any* process for his deprivation, state court remedies provide sufficient relief for purposes of section 1983.[7]

Plaintiff also contends that he has a liberty interest in his job assignment, overtime opportunities, and April vacation. The Supreme Court has held that even the loss of one's job does not amount to a deprivation of liberty so long as a person remains able to locate alternate em-

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[6] *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), is distinguishable. The reason a post-deprivation state tort action did not there satisfy due process requirements was because appellant challenged an "establish[ed] state procedure" that destroyed his entitlement. Contrariwise, the alleged actions taken by defendants to alter plaintiff's vacation schedule were random acts which more properly fit within the rules enunciated in *Parratt*.

[7] We note that plaintiff does not assert a property interest arising out of contractual obligations contained in his employment contract.

ployment. *Paul v. Davis*, 424 U.S. 693, 709-10 (1976), *reh. denied*, 425 U.S. 985 (1976); *Board of Regents v. Roth*, 408 U.S. 564, 573-75 (1972). This circuit has held that no liberty interest is implicated where a plaintiff is denied a promotion, since he remains free to seek alternate employment if dissatisfied with his job. *Webster v. Redmond*, 599 F.2d 793, 798 (7th Cir. 1979), *cert. denied*, 444 U.S. 1039 (1980). Whether defendants' treatment of plaintiff Altman is viewed as internal disciplining or a constructive demotion, the logic of *Webster* forecloses a finding that a liberty interest has been implicated.[8]

Last, plaintiff has failed to make out a substantive due process claim. The Supreme Court has made clear

> that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech.

Perry v. Sindermann, 408 U.S. 593, 597 (1972).

Thus, plaintiff cannot be disciplined consistently with the due process clause in retaliation for the exercise of his first amendment rights. Even assuming however, that plaintiff was disciplined because he encouraged another officer to appeal her suspension and in retaliation for his filing of the instant law suit, it does not follow that those comments are protected by the first amendment.

The Supreme Court, in *Connick v. Myers*, 103 S. Ct. 1684 (1983), recently announced a test to determine when

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[8] The mayor, when questioned by newspapers, apparently informed them that Altman was being disciplined. Such a comment, in and of itself, is not so defamatory and stigmatizing as to trigger a liberty interest. *See Paul v. Davis*, 424 U.S. 693 (1976), *reh. denied*, 425 U.S. 985 (1976); *Hadley v. County of Du Page*, 715 F.2d 1238, 1244 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 1000 (1984).

the first amendment protects the speech of public employees. It there held "that when a public employee speaks not as a citizen upon matters only of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." 103 S. Ct. at 1690. In *Connick*, an assistant district attorney was fired for insubordination for distributing a questionnaire to other district attorneys in the office. The questionnaire concerned office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns. The Court, finding that at least the last issue was one of public concern, nevertheless concluded that the questionnaire, on the whole, did not involve speech of public concern. Instead it characterized the questionnaire as an act of insubordination motivated by plaintiff's unhappiness over a planned transfer. Given the essentially "private motive" for the speech, plaintiff's firing was not actionable under section 1983. Similarly, Altman's conduct, to the extent it can be construed as speech, did not involve matters of public interest; rather, it concerned a private personnel dispute.[9] Moreover, Altman, unlike the plaintiff in *Connick*, was neither fired nor suspended. On these facts, *Connick* mandates affirming the dismissal of plaintiff's action.[10]

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[9] Plaintiff's failure to report the incident involving the suspended officer after the police chief specifically asked for a complete review of the officer's performance can be characterized as insubordination.

[10] Several Supreme Court cases indicate that the first amendment protects a person's right to seek judicial redress of grievances. *See Bates v. State Bar*, 433 U.S. 350, 376 n.32 (1977), *reh. denied*, 434 U.S. 881 (1977); *NAACP v. Button*, 371 U.S. 415, 429 (1963). A close reading of these cases clearly shows that the Court

(Footnote continued on following page)

Although plaintiff's cause of action fails to state a claim upon which relief could be granted, this is nevertheless a disturbing case. Had plaintiff quit his job, a result defendants no doubt hoped to induce, his constructive discharge would have enabled him to maintain this action. *See Brown v. Brienen*, 722 F.2d 360, 365 (7th Cir. 1983) (dictum); *Bourque v. Powell Electrical Mfg. Co.*, 617 F.2d 61, 65 (5th Cir. 1980). It may seem illogical and unfair to take away plaintiff's federal remedy because he insisted on toughing-out his ordeal. The constructive discharge cases cannot be distinguished by pointing to the loss of income attendant to such a job loss. The measure of real loss in such a situation need not be significant—plaintiff need not show that he has been unable to obtain comparable alternate employment to maintain an action.[11] On the other hand, the utility one obtains from a job does not derive exclusively from the amount of pecuniary remuneration received. Plaintiff, prior to the giving of his advice and the filing of his law suit, could take pride and pleasure in the supervisory responsibilities of his job. He may well have suffered a real, albeit psychic, loss through reassignment to "window watch" and foot patrol, even though his salary remained constant. Moreover, his human capital—measured in terms of opportunities for advancement—may well be impaired by defendants' decision to deny him responsible work assignments.

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[10] *continued*
was concerned about political expression and not the general right to bring suit in a federal court of law. *See, e.g., Button*, 371 U.S. at 429. ("In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means of achieving the lawful objectives of equality of treatment by all government, federal, state and local, for the members of the Negro community in this country. It is thus a form of political expression.") This formulation dovetails with the *Connick* rule that limits the first amendment protection given public employees to pronouncements on public issues. Thus, a private office dispute cannot be constitutionalized merely by filing a legal action.

[11] Such evidence would, however, influence a determination of the amount of damages arising out of the deprivation.

Despite our sympathy for plaintiff and our incredulity over some of the disciplinary measures imposed by defendants, we recognize that permitting him to maintain this action would open the federal floodgates to all manner of petty personnel disputes. Such disputes are best left to internal procedures established by employers and employees or, as here, where no such protection exists or where such procedures are inadequate, through state court adjudication. Since plaintiff remains in the employment of the Hickory Hills police department, there is no deprivation of a property or liberty interest cognizable under section 1983. Since plaintiff's speech, if such it was, did not involve matters of public concern, his first amendment rights have not been violated. Accordingly, the order of the district court is

AFFIRMED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

June 11, 1984

Before
Hon. WILLIAM J. BAUER, *Circuit Judge*
Hon. HARLINGTON WOOD, JR., *Circuit Judge*
Hon. RICHARD A. POSNER, *Circuit Judge*

No. 83-1868

DENNIS ALTMAN,

Plaintiff-Appellant,

v.

PETER F. HURST, Chief of Police of the City of Hickory Hills, ERVIN KOZICKI, Mayor of Hickory Hills, Illinois, and THE CITY COUNCIL OF THE CITY OF HICKORY HILLS, ILLINOIS,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 82 C 7224—**George N. Leighton,** *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by Plaintiff-Appellant Dennis Altman, no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

It is ordered that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge: Honorable George N. Leighton

Cause No. 82 C 7224 Date March 4, 1983

Title of Cause: Altman v. Hurst, et al.

Brief Statement of Motion: Motion to Dismiss

* * *

For reasons stated in the Memorandum filed herewith, defendants' motion to dismiss the first amended complaint is granted, and this suit is dismissed.

/s/ LEIGHTON, J.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 82 C 7224

DENNIS ALTMAN,

Plaintiff,

vs.

PETER F. HURST, CHIEF OF POLICE OF THE CITY OF HICKORY HILLS, ILLINOIS POLICE DEPARTMENT, ERVIN KOZICKI, MAYOR OF HICKORY HILLS, ILLINOIS, and THE CITY COUNCIL OF THE CITY OF HICKORY HILLS, ILLINOIS,

Defendants.

Before the Honorable George N. Leighton
United States District Judge

MEMORANDUM

The cause is before the court on defendants' motion to dismiss plaintiff's first amended complaint. For the following reasons, the motion is granted.

Plaintiff, a sergeant with the Hickory Hills Police Department, claims that his superiors retaliated against him for supposedly encouraging a fellow officer to appeal an order of suspension; defendants, it is alleged, punished plaintiff by requiring him to sit outside the office window of the Chief of Police and by subsequently assigning him

other undesirable tasks. Plaintiff alleges that defendants further mistreated him by depriving him of overtime and requiring him to take his vacation in January instead of in April.

Plaintiff brings this action under 42 U.S.C. §1983, claiming that defendants' conduct deprived him of liberty and property interests protected by the due process clause. He contends that he has suffered a deprivation of constitutional magnitude in that the assignments, particularly the one placing him outside the Chief's window, prevented him "from engaging in . . . police work without being subjected to ridicule, embarrassment, harassment or being demeaned."

It is established, however that injury to reputation, though induced by state action, standing alone, cannot constitute a deprivation of a constitutional liberty interest. *Paul v. Davis*, 424 U.S. 693 (1976). Plaintiff must establish, moreover, that he was stigmatized in connection with a denial of a right or status previously recognized under state law. *Moore v. Otero*, 557 F.2d 435, 437 (5th Cir. 1977).

The only state law invoked by plaintiff in support of his claim is Ill. Rev. Stat. ch. 24, §2.1-17, a statute providing that a policeman can only be discharged or removed for cause, following a hearing. But in this case plaintiff does not allege that he was suspended, discharged, or removed from office; thus, it is apparent from the face of the complaint that Section 2.1-17 is inapplicable. Plaintiff, therefore, has no basis for complaining that he has been deprived of a constitutionally protected interest because defendants caused injury to his reputation and failed to grant him hearings before making new job assignments. *Moore*, 557 F.2d at 438. Furthermore, there is no state law guaranteeing plaintiff overtime or vacations in April. Accordingly, the court concludes that plaintiff does not and cannot, based on these pleadings, state a claim under 42 U.S.C. §1983. Defendants' motion is

granted; the first amended complaint and this suit are dismissed.

So ordered,

/s/ GEORGE N. LEIGHTON
United States District Judge

Dated: MAR. 4, 1983

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Name of Presiding Judge: Honorable George N. Leighton
Cause No. 82 C 7224 Date April 18, 1983
Title of Cause: Altman v. Hurst, et al.
Brief Statement of Motion: Motion for reconsideration

* * *

For the reasons stated in the Memorandum filed herewith, the court adheres to its prior ruling dismissing this suit.

/s/ LEIGHTON, J.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 82 C 7224

DENNIS ALTMAN,

Plaintiff,

vs.

PETER F. HURST, CHIEF OF POLICE OF THE CITY OF HICKORY HILLS, ILLINOIS POLICE DEPARTMENT, ERVIN KOZICKI, MAYOR OF HICKORY HILLS, ILLINOIS, and THE CITY COUNCIL OF THE CITY OF HICKORY HILLS, ILLINOIS,

Defendants.

Before the Honorable George N. Leighton
United States District Judge

MEMORANDUM

The cause is before the court for reconsideration of the order dismissing this action in its entirety. For the following reasons, the court adheres to its prior ruling.

On March 4, 1983, this court held that plaintiff failed to state a claim which described a constitutionally protected liberty or property interest by alleging that he was subjected to arbitrary discipline when defendants, his superiors in the Hickory Hills Police Department, gave him a series of undesirable assignments, deprived him of

overtime, and required him to take a vacation in January instead of in April. The court emphasized that under Illinois law a policeman is entitled to a hearing regarding the validity of job-related disciplinary measures only when he has been discharged, removed, or suspended.[1] Additional authority for the court's position is provided by *Confederation of Police v. City of Chicago*, 547 F.2d 375 (7th Cir. 1977), where the Court of Appeals for this Circuit made the following pertinent remarks when it dismissed a suit by Chicago policemen based on allegations similar to those in this case:

> Plaintiffs contend that Chicago patrol officers are subject to changes in geographic assignments and work schedules, denials of proposed vacation schedules and leaves of absence, and demotions without effective explanation or review. They urge that this deficiency violates the equal protection and due process clauses of the fourteenth amendment to the Constitution.
>
> . . .
>
> There is no Illinois law, whether from a statutory, regulatory, or judicial source, that protects a Chicago patrol officer from adverse action short of discharge or suspension by the Police Department.
>
> . . .
>
> Absent affirmative recognition in Illinois law of an entitlement to particular job conditions, plaintiff's due process claim must fail.

---

[1] *Altman v. Board of Fire and Police Commissioners of the City of Elmhurst*, No. 82-145 (Ill. App. Nov. 12, 1982), though heavily relied on by plaintiff, actually is supportive of the court's ruling, since the case involved the *suspension* of a police officer by a Chief of Police.

547 F.2d 375-376. *Confederation of Police* is fully consistent with the reasoning underlying the order of March 4, 1983.

So ordered,

/s/ GEORGE N. LEIGHTON
United States District Judge

Dated: APR. 18, 1983

Office-Supreme Court, U.S.
FILED
OCT 11 1984
ALEXANDER L. STEVAS,
CLERK

(2)

No. 84-403

In The

Supreme Court of the United States

October Term, 1984

DENNIS ALTMAN,

Petitioner,

vs.

PETER F. HURST, Chief of Police of the City of Hickory Hills, Illinois, ERVIN KOZICKI, Mayor of Hickory Hills, Illinois, and THE CITY COUNCIL OF THE CITY OF HICKORY HILLS, ILLINOIS,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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STATUTE CITED

42 U.S.C. § 1983	1, 4

ARGUMENT

The legal principles which govern the decision in this case have been well established by this court and other federal courts for many years. In order for the plaintiff to establish a 42 U.S.C. § 1983 claim based upon the due process clause of the Fourteenth Amendment of the United States Constitution, the plaintiff must first establish a property or liberty right, and second, establish a deprivation without due process. The plaintiff has misconstrued the question presented for review before this court by assuming that he had such a property or liberty right. The question for review is not whether opening the floodgates to federal litigation should act to deprive the plaintiff of his due process rights, but does the plaintiff have a property or liberty interest which was deprived without due process of law.

This case is hardly unique and does not present any questions which are unresolved by federal court decisions, neither does it present a case where the different circuits of the U. S. Court of Appeals are in disagreement on the principles of law. This case simply involves a petty personnel dispute between an employer and an employee.

It has been long established that property rights are created not by the United States Constitution, but are created and derived from state law. *Board of Regents v. Roth,* 408 U.S. 564, 577. A claim of entitlement under state law must be derived from statute or legal rule or through a mutually explicit understanding. *Leis v. Flynt,* 439 U.S. 438, 442 (1979).

The plaintiff cannot rely upon any statutory property right because he was not suspended or discharged. The

courts are unanimous in holding that absent affirmative recognition in law, entitlement to particular job conditions does not support the creation of a property right. *Confederation of Police v. City of Chicago,* 547 F.2d 375, 376 (7th Cir., 1977). Under Illinois law, the defendants have a clear right to change conditions of employment for its employees:

> "The conditions of public employment may be changed. Section 11-1-2 of the Illinois Municipal Code (Ill. Rev. Stat. 1981, Ch. 24, par. 11-1-2) has been held to confer the power to make regulations concerning members of the municipal police force."
>
> *Phillips v. Hall,* App. 2 Dist., 69 Ill.Dec. 201, 447 NE2d 418, 425 (1983).

While the defendants will agree with the U. S. Court of Appeals that the plaintiff's rights are trivial, the simple fact is that they are not rights at all but unilateral expectations which can be changed, and do not arise to the class of property interests protectable by law.

Clearly the plaintiff has no liberty interest in his job assignment, vacation in April, or overtime opportunities as he has not even lost his job. This court has held that even the loss of a job does not amount to a deprivation of a liberty interest as long as a person remains able to locate alternate employment. *Paul v. Davis,* 424 U.S. 693, 709-10 (1976), *reh. denied,* 425 U.S. 985 (1976). This is also true where there has been a denial of a promotion. *Webster v. Redmond,* 599 F.2d 793, 798 (7th Cir., 1979), *cert. denied,* 444 U.S. 1039 (1980). When a public employee retains employment, even after being demoted and defamed, he derives injury only to his reputation and that is not an interest which arises to the level of a pro-

tectable liberty interest. *Moore v. Otero,* 557 F.2d 435, 438 (5th Cir., 1977).

Nowhere in the plaintiff's petition for a writ has he even established the existence of any property or liberty right, he has simply skipped that requirement and gone immediately to the next step arguing that he has been deprived of due process. This court need not even decide the question presented for review as the plaintiff has not established a property or liberty right and the petition should be denied.

Assuming that the plaintiff has a property or liberty right, he has not established that any deprivation without due process of law has occurred. A pre-deprivation hearing or a post-deprivation hearing can satisfy due process. *Mathews v. Eldridge,* 424 U.S. 319 (1976).

The plaintiff has not argued and certainly would have no grounds to argue that a pre-deprivation hearing would be necessary. The substantial interest of the city in managing the day-to-day work schedules of its employees would create an undue burden weighed against the minor interests of the plaintiff. There is no risk of erroneous deprivation because the procedures used by the chief of police give him knowledge of all facts involved. A pre-deprivation hearing is meaningless as there are no constraints on the defendants as to what actions they can take. In this case, no pre-deprivation due process is required as there is nothing to be gained by the plaintiff and substantial administrative burden and loss to the defendants.

If due process must be given, post-deprivation state court remedies are sufficient for purposes of Section 1983. *Parratt v. Taylor,* 451 U.S. 527 (1981) *Hudson v. Palmer,* 104 S.Ct. 3194 (1984). The plaintiff has at least three possible causes of action under state law if, in fact, he has been wronged. He can sue for defamation if he has been defamed. He can sue for intentional infliction of emotional distress, if the conduct of the defendants is extreme and outrageous and results in severe distress such that no reasonable man could be expected to endure it. While the plaintiff argues that such a remedy is not available to him because the conduct in this case is not so severe, he argues in other places that he has a protected interest under the doctrine of constructive discharge because the conduct of the defendants was so severe that no reasonable person would have stayed on the job. If the conduct is so severe, then he has a state court remedy.

The Illinois courts have been presented with cases similar to the plaintiff's and have always given the plaintiff relief if the conduct of the defendants is in bad faith and oppressive. Most recently in *Phillips v. Hall* at p. 423, where a police chief was determined to have acted properly and no judicial intervention was warranted, the court stated that the plaintiff would have a state court remedy if he could prove bad faith and oppressiveness.

Just as this court has resisted the extension of Section 1983 cases in defamation, *Paul v. Davis,* 424 U.S. 693, into medical malpractice, *Estelle v. Gamble,* 429 U.S. 97 (1978), and into false imprisonment, *Baker v. McCollan,* 99 S.Ct. 2689 (1978), so should this court resist the extension into local personnel policies. In all those areas and in this case, adequate state court remedies are avail-

able. The plaintiff would have this court decree a federal personnel policy throughout the land, but such is a matter for local legislatures. If the court were to grant this petition and rule that the plaintiff had a federal cause of action, the next logical step would mean that any contract dispute over personnel policies with a local government would also be a federal case. Clearly if due process is required, the plaintiff can obtain it in state court where local due process personnel disputes should be handled.

CONCLUSION

It is respectfully submitted that the plaintiff has failed to sustain his burden that there are special and important reasons why the writ should be granted. The United States Court of Appeals has correctly decided that this is not a matter establishing a federal cause of action. The petition for certiorari should be denied.

Respectfully submitted,

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